Supreme Court of the United States

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

Supplemental Brief for Defendant in Error.

The argument for plaintiffs in error urges that by reason of the provisions of the act of Congress of July 1, 1898 (30 Stats., 620), the claim of the plaintiff in error Henry Nelson is confirmed. The text of the act is as follows:

"That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided.

the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided, however*, That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest Government subdivisions; and all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner here-

inbefore provided, lands in lieu of those relinquished, and patents shall issue therefor; *Provided, further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron or coal; *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor; *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company, as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further*, That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-

eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this act."

The first answer to this argument is that the contention is urged for the first time in this court. In *National Bank vs. Commonwealth*, 9 Wall., 353, 363, this court said:

"We have so often of late decided, that when a case is brought before us by writ of error to a State court, we can

only consider such alleged errors as are involved in the record, and actually received the consideration of the State court, that it is only necessary to state the proposition now. As the question thus sought to be raised here was not raised in the court of appeals of Kentucky, we cannot consider it."

See also *Insurance Company vs. Mordecai*, 24 How., 117.

But if the court shall reach the question of the construction of the act and its application to this case, it is submitted that the case is not within its terms. The act is manifestly a remedial measure, having for its object the amicable adjustment of pending controversies to lands within the limits of the Northern Pacific grant. In the case of all such controversies it offers first to the settler or purchaser from the United States the option of electing to retain the disputed land or to relinquish it and transfer his claim to other public land of equal area. In the event that the settler or purchaser elects to retain the land, it then becomes the duty of the Secretary of the Interior to include the land in a list to be furnished to the company and to request a relinquishment thereof, and upon such relinquishment by the company it, in turn, becomes entitled to select in lieu an equal quantity of public land. It is manifest that the provisions of the act could not have been forced upon the company against its will, and that any acceptance on its part must have been purely voluntary, for where it had acquired vested rights they could not have been taken away by Congress; and the object of the legislation being plainly to afford an opportunity for the adjustment of differences between the company and settlers, it is not reasonable to suppose that Congress intended that it should apply to controversies that had been successfully waged by the company in the Interior

Department and which had culminated in the issue of patents to the company as in the case under consideration, nor would Congress anticipate that the company would feel impelled by way of compromise to relinquish lands that had been thus finally awarded to it.

Indeed the language of the act clearly negatives this construction, for in defining the classes of cases contemplated by its provisions it includes not lands owned by the company or patented to it, but lands *claimed* by it "by definite location or selection." On the other hand, when specifying the interest of the adverse party necessary to bring a case within the operation of the act, it includes lands settled upon in good faith or purchased from the United States prior to January 1, 1898. If the act should be construed to include lands patented to the company, it is plain that it would cast a cloud on the title of every acre of patented land within the Northern Pacific grant, for the only proof necessary to defeat such a patent would be proof that prior to January 1, 1898, the land had been occupied by a settler in good faith. It is doubtful if subsequent abandonment would defeat the settler's right or cure the patent; certainly a temporary absence with evidence of intention to return would not prevent the application of the act. The result of this construction would be that the title to any tract of land patented to the company would not be determined by record evidence, but would rest solely upon parol—a result opposed to the settled policy of the law relating to land grants.

Kansas Pacific Railway Company vs. Dunmeyer, 113 U. S., 629.

Whitney vs. Taylor, 158 U. S., 85.

Southern Pacific Railroad Co. vs. De Lacey, 174 U. S., 622.

The construction contemplated by plaintiffs in error is sought to be sustained by the decision of the circuit court for the district of Minnesota in *Humbird vs. Avery*, 110 Fed., 465. In that case a suit in equity was brought by certain grantees of the Northern Pacific Railway Company against certain settlers on lands within the grant to whom patents had been issued to hold them trustees of the legal title. The circuit court held that the effect of the act of 1898 was to confirm the title of the settlers to whom these patents had been issued. This case went upon appeal to the circuit court of appeals for the eighth circuit, and the question whether the act of 1898 applies even to lands patented to settlers is now before this court on certificate from the court of appeals, being No. 382 on the calendar for the present term. Whether the circuit court was right in applying the act of 1898 to lands patented to settlers is an altogether different question from that involving a construction which would apply it to lands patented to the company, for the settler is given the option to elect whether he will retain the land or relinquish it, whereas no option is extended to the company in case the settler elects to retain the land.

It is the settled construction of the Interior Department that the act does not apply to lands patented before its passage, as appears from the circular of instructions submitted with the principal brief, and also from *Wasmund vs. Northern Pacific Railroad Co.*, 29 Land Decisions, 224.

In the next place, the record in this case does not show that Henry Nelson comes within the provisions of the act on any construction. The agreed statement of facts was made up and filed November 15, 1897 (Trans., p. 8), before the passage of the act. The act extends only to purchasers from the United States and to persons who "settled in good faith" prior to January 1, 1898. There is nothing to show

that Nelson settled "in good faith." Furthermore, the act provides that the company shall not be required to relinquish lands valuable for stone, iron, or coal or lands which it uses or needs for railroad purposes or lands which it has sold or contracted to sell. The issues having been settled, the agreed statement of facts filed, and the case tried before the act of July 1, 1898, was passed, there was and could be no inquiry as to whether the land came within any of these classes (Trans., p. 14).

Finally, the administration of the act of 1898 is in terms committed to the Secretaty of the Interior, and the determination of the questions of fact as to whether Henry Nelson was a settler in good faith so as to come within its provisions, and whether the land is valuable for stone, iron, or coal, or whether it is used or needed for railroad purposes, or whether it has been sold or contracted to be sold by the company and so excluded from the operation of the act, even if its construction be as claimed by the plaintiffs in error, are matters exclusively for the determination of the Secretary of the Interior.

Marquez vs. Frisbie, 101 U. S., 473.

If the plaintiff in error Henry Nelson has any rights under the act of the United States, he is entitled to proceed for their enforcement before the Secretary of the Interior. The act manifestly contemplates such procedure, and it is especially provided by paragraph 22 of the circular of instructions that an individual claimant may institute proceedings of his own motion.

It is submitted that the judgment should be affirmed.

C. W. Bunn and
James B. Kerr,
Counsel for Defendant in Error.

CIRCULAR

FROM THE

44

GENERAL LAND OFFICE,

CONTAINING

REGULATIONS, UNDER THE ACT OF JULY 1, 1898 (30 STAT., 597, 620), TO FACILITATE THE ADJUSTMENT BY THE LAND DEPARTMENT OF CONFLICTING CLAIMS TO LANDS WITHIN THE LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

APPROVED FEBRUARY 14, 1899.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 14, 1899.

The provision in the act of July 1, 1898, is as follows:

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided, however*, That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest Government subdivisions; and all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as

if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal: *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further*, That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their bona fide residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore pro-

vided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this act.

A.—WHO ARE THE BENEFICIARIES UNDER THIS ACT? FROM WHOM MAY RELINQUISHMENTS BE RECEIVED, AND BY WHOM MAY THE LIEU SELECTIONS BE MADE?

1. The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company, or its successor in interest, and in doing so different words and terms of description are used in different portions of the act; but, considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase, initiated in good faith a claim to lands of the description given, "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling.

This class also embraces the heirs of the claimant in all instances where he has died, and his claim or entry or right to perfect title thereunder is one which under the public-land laws descends or passes to his heirs. It further embraces the assigns of the claimant in all instances where, in the absence of an inhibition against so doing, he has sold or transferred his claim or entry, or the right to perfect title thereunder, to one who is not by law disqualified from succeeding to such claim or entry, or the right to perfect title in himself thereunder.

2. The act designates as one beneficiary the Northern Pacific Railroad Company, or its lawful successor in interest, subject, however, to the following proviso:

* * * *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States; but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act. * * *

An examination of a certified copy of the record in the foreclosure proceedings referred to, and a consideration of the opinion of the Attorney-General dated February 6, 1897 (21 Opinions of Attorneys-General, 486), show that the Northern Pacific Railway Company is such lawful successor in interest as to all lands within the limits of the grant, excepting those situated in the State of Minnesota and in the State of North Dakota east of the Missouri River. As to all lands within the

limits of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri River, the Northern Pacific Railroad Company has no successor in interest, but its property and affairs are now in the hands of receivers, appointed and acting under the authority and direction of certain circuit courts of the United States.

Within the limits of that portion of the grant to which the Northern Pacific Railway Company is thus the lawful successor in interest, relinquishments should be executed, and selections in lieu thereof should be made by said railway company. Within the limits of that portion of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri River, relinquishments should be executed by the Northern Pacific Railroad Company, and also by the receivers thereof, and selections in lieu thereof should be made by such receivers on behalf of the railroad company; the receivers, in executing relinquishments and in making lieu selections, to act under proper authorization first obtained from the proper court.

3. In these regulations the claimant adverse to the railroad company or its successor in interest will, for convenience, be spoken of as the individual claimant his claim to the land in contest or controversy will be spoken of as an individual claim; the railroad company or its successor in interest, as the case may be, will be spoken of as the railroad claimant, and its claim to the land in contest or controversy will be spoken of as the railroad claim.

B.—WHAT LANDS ARE SUBJECT TO RELINQUISHMENT SO AS TO BECOME THE BASES FOR LIEU SELECTIONS?

4. To authorize a lieu selection the relinquishment must be of the whole or some legal subdivision of an odd-numbered section in either the primary or indemnity limits of the land grant to the Northern Pacific Railroad Company, which is the subject of conflicting claims asserted by an individual claimant upon the one part and by the railroad claimant upon the other part.

5. A relinquishment can in no event be made until after the land claimed has become identified by the public surveys.

6. The act makes *special provision* for instances where, *after January 1, 1898*, a qualified person in good faith makes settlement, with a view to homestead entry, upon unsurveyed lands within the primary limits of said grant, which upon survey are found to be within an odd-numbered section to which the right of the railroad company has attached by the definite location of its line of road. The purpose of this provision is to afford relief to those who make such settlement before the identification by survey of the lands to which the railroad claimant is entitled.

Such settlement claim must be continued and the right of the settler asserted after survey by an application at the local land office to make homestead entry of the lands settled upon, accompanied by proof of

such settlement, and the continued maintenance of the claim. These claimants are not accorded the privilege of taking other lands in lieu of those settled upon; but if the proof submitted is deemed satisfactory the railroad claimant will be requested to relinquish the lands embraced in said claims and to take other lands. All the provisions of these regulations are applicable to these lands excepting those pertaining to relinquishments by individual claimants.

7. Since the issuance of patent terminates the jurisdiction of the Land Department over the lands patented, and exhausts its power to examine and decide upon claims to such lands, and since this act manifestly refers to conflicting claims to lands which have not passed beyond the jurisdiction of the Land Department, it follows that its provisions are confined to unpatented lands, and that lands which have been patented are not the subject of relinquishment and can not be made the basis of a lieu selection under this act; but the point to which the opposing claims have been prosecuted, or the extent to which they have been considered by the Land Department, is not material if they be otherwise within the terms of the act, and the lands remain unpatented.

C.—WHAT ARE THE CLAIMS WHICH COME WITHIN THE PROVISIONS OF THIS ACT?

8. An individual claim adverse to the railroad claim is one which, prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry, or purchase, "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title. (See also paragraph 6.)

9. The railroad claim is one which arises from the definite location of the line of railroad if the land is within the primary limits of the grant, or which arises from a lieu selection if the land is within the indemnity limits, and is one which, in the absence of all individual claims, would enable the railroad claimant to obtain full title to the land.

10. The purpose of the act is to avoid further strife and contention before the Land Department between the railroad claimant upon the one hand and individual claimants upon the other hand, and to that end the act extends alternately to the individual claimant and the railroad claimant an opportunity to acquire other lands of equal area in lieu of those in contest. The privilege of making a lieu selection is not dependent upon success or failure in the contest, but rather upon the existence of a contest or controversy which is intended to be disposed of without subjecting the parties to the delay, expense, and inconvenience incident to its further prosecution. The act contains a provision that nothing therein "shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted;" but in the light of other provisions in the act in harmony with which this one must be construed, it is

obvious that this provision is not intended to restrict the operation of the act to those instances in which the railroad claim is ultimately found to be the superior one.

To ascertain that fact would require the prosecution of every contest to a final decision, and would render the act practically inoperative, because, if compelled to litigate its claim to a final decision through the local office, the General Land Office, and before the Secretary of the Interior, it is doubtful whether the railroad claimant would surrender for the benefit of the defeated individual claimant the railroad claim thus established at a cost of much time, expense, and inconvenience. The claim which will support a relinquishment and lieu selection is not described as a *lawful* one, but as a "right * * * *claimed* to have attached by definite location or selection," and as a claim initiated in good faith "*under color of title or claim of right*," etc. Under the act of July 2, 1864 (13 Stat., 365), the railroad company became entitled to all the odd-numbered sections within the primary limits of the grant, or to indemnity for such as were "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," at the date of the definite location of its line of road.

Thus, the maximum quantity of lands to which the company was entitled is established by ascertaining the area included in odd-numbered sections within the primary limits of the grant as adjusted to the line of definite location. The clause in the act of July 1, 1898, providing against an enlargement of the quantity of lands to which the railroad company was then entitled has reference to the maximum quantity ascertained as aforesaid, and does not restrict the privilege of making selections under that act to those instances where the railroad claimant has an absolute legal right to the particular lands relinquished, a matter which would not be involved in an ascertainment of the quantity of the grant.

D.—WHAT LANDS ARE SUBJECT TO SELECTION IN LIEU OF THOSE RELINQUISHED?

11. Selections will be limited to a quantity of land not exceeding that relinquished, but, since all selections must be according to legal subdivisions which generally approximate but do not always embrace the same area, a slight difference in the acreage of the tract relinquished and selected will not be deemed an inequality in quantity.

12. Subject to the limitations named in paragraphs 13 and 14, selections may be made from any public lands within a State into which the Northern Pacific Railroad land grant extends, surveyed or unsurveyed, not mineral or reserved, not valuable for stone, iron, or coal, not subject to valid adverse claim, and not occupied by a settler at the time of such selection; but odd numbered sections within the Bozeman, Helena, and Missoula land districts in the State of Montana, and the Cœur d'Alene land district in the State of Idaho, which are also within the primary or indemnity limits of said land grant, can not be selected by

or patented to the railroad claimant unless they have been finally classified as non-mineral under the act of February 26, 1895 (28 Stat., 683).

13. Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein "to be identified by the survey when made," that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected.

Selections of unsurveyed lands by an individual claimant must be designated according to the description by which they will be known when surveyed, if that be practicable, or if not practicable, by giving with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of survey come to be extended, and the selection must be made to conform to such survey within thirty days from the date of the receipt at the local land office of the approved plat of the township embracing such lands.

14. Lands selected by an individual claimant in lieu of other lands, the claim to which has *not* been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, must be in a compact body and be of the character subject to entry under the particular law controlling the claim relinquished, and this applies whether the lands selected are surveyed or unsurveyed. (See paragraph 36.)

E.—PROCEDURE IN OBTAINING RELINQUISHMENTS.

15. As soon as may be practicable after the adoption of these regulations, an examination will be made of the contests pending before the Secretary of the Interior, and those appearing to come within the provisions of the act of July 1, 1898, will be returned to the Commissioner of the General Land Office for disposition hereunder, together with all like contests then pending in the General Land Office. From time to time thereafter other contests or controversies appearing to come within the provisions of said act will be disposed of in like manner. Any claimant believing that his or its claim comes within the provisions of said act may request that such claim be disposed of thereunder, and such request will receive due consideration.

16. In speaking of the surrender by the individual claimant of the lands in contest and the taking by him of other lands in lieu thereof, the act describes it as a *transfer of his claim or entry;* but since the transaction, whether by the individual claimant or by the railroad claimant, is essentially the same, it is for convenience described and spoken of throughout these regulations as a relinquishment of the lands in contest and a selection of other lands in lieu thereof.

17. The option of relinquishing the lands in contest and selecting other lands in lieu thereof is by law first extended to the individual

claimant, and if he elects to hold the lands which are in contest the railroad claimant will be called upon to relinquish the same and to select other lands in lieu thereof. (See paragraphs 29 to 31, inclusive.)

18. Whenever any contest or controversy appears to come within the provisions of said act, the Commissioner of the General Land Office will notify the individual claimant of the option accorded by law to individual claimants and will request him, if still maintaining his claim as herein required, to make proof of such continued maintenance and to exercise his option within sixty days after the time of receiving such notice. (See paragraph 30.) If the claimant elects to relinquish the lands in contest and take other lands in lieu thereof, he must execute a proper relinquishment as hereinafter required (see paragraphs 24 to 26, inclusive), and transmit the same to the Commissioner of the General Land Office, together with notice of his election so to do.

19. In all cases where the individual claim has not passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, a failure to furnish satisfactory proof of the continued maintenance of the claim and to exercise such option within the time named will be deemed an abandonment of the claim, and the land embraced therein will be disposed of accordingly.

20. In all cases where the individual claim has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, proof of the continued maintenance of the claim is not essential, but a failure to exercise such option within the time named will be deemed an election on the part of the individual claimant to hold the land in contest.

21. The Commissioner of the General Land Office may, in his discretion, extend the time for exercising such option in special cases upon proper cause being shown.

22. An individual claimant may, without formal notice or request, make proof of the continued maintenance of his claim and exercise his option and notify the Commissioner of the General Land Office thereof, in which event the notice and request otherwise required will not be necessary. (See paragraphs 18 and 24 to 26, inclusive.)

23. From time to time, and as soon as conveniently may be done, the Commissioner of the General Land Office shall prepare and submit to the Secretary of the Interior duplicate lists describing, according to the smallest legal subdivision, the lands to which there are conflicting claims as described in these regulations, and which the individual claimants have elected to hold; and, upon the approval of any such list by the Secretary of the Interior, the Commissioner of the General Land Office will retain one copy thereof in his office and will transmit the other copy thereof to the said railroad claimant, with the request that it relinquish its claims to the lands therein described. Every list will be deemed conclusive against the railroad claimant to the extent that it will be required, within sixty days after receipt thereof, to execute and deliver to the Secretary of the Interior a proper relinquishment to

the United States of all the lands in said list, or to make satisfactory showing that those not relinquished have been sold or contracted to be sold, or are used or needed for railroad purposes, or are valuable for stone, iron, or coal. (See paragraphs 24 to 26, inclusive, and 29 to 31, inclusive.)

F.—WHAT IS A PROPER RELINQUISHMENT?

24. The relinquishment must be an instrument in writing describing the lands in contest and making appropriate reference to the claim intended to be surrendered, and in terms releasing, quitclaiming, and relinquishing unto the United States of America all the right, title, interest, and claim of the individual or railroad claimant, as the case may be, to such lands. It must be executed, witnessed, and acknowledged conformably to the laws respecting the conveyance of real property in the State where the land is situate.

25. Relinquishments by individuals of claims which have passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, must also be executed by the wife of the claimant, if he have one, in such manner as will effectually bar any dower, homestead, or other interest on her part in or to the lands relinquished.

26. A relinquishment of an individual claim which has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, or which under existing laws is assignable before that time, and also all relinquishments by the railroad claimant, must be accompanied by proof satisfactorily showing whether the land relinquished has been sold, contracted to be sold, or encumbered. (See paragraphs 1 and 32.)

G.—EFFECT OF RELINQUISHMENT—WHEN TO SELECT OTHER LANDS IS COMPLETE.

27. Upon the filing with and acceptance by the Commissioner of the General Land Office of a relinquishment by the individual claimant the lands in contest may be patented to the railroad claimant in the same manner as other lands falling within the terms of the grant; and the individual claimant, upon receiving notice of the acceptance of his relinquishment, will be entitled, upon proper application (see paragraph 32), to select other lands, according to the condition and limitations of said act (see paragraph 36).

28. Upon the filing with and acceptance by the Commissioner of the General Land Office of a relinquishment by the railroad claimant the lands so relinquished "shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee;" and the individual claimants thereto shall be permitted to perfect their claims or entries and to obtain title thereunder upon compliance with the laws pertaining thereto. In the event that any individual claim on account

of which a relinquishment is made by the railroad claimant is not perfected into full title the lands embraced therein will not revert to the railroad claimant, but will be subject to other disposition, according to law. The railroad claimant, upon receiving notice of the acceptance of its relinquishment, will be entitled, upon proper application (see paragraphs 32 to 41, inclusive), to select other lands, according to the conditions and limitations of said act.

H.—DISPOSITION OF CONTESTS INVOLVING LANDS SOLD OR CONTRACTED TO BE SOLD BY THE RAILROAD CLAIMANT, USED OR NEEDED FOR RAILROAD PURPOSES, OR VALUABLE FOR STONE, IRON, OR COAL.

29. By the terms of the act the railroad claimant is exempted and excused from relinquishing lands which have been sold or contracted to be sold by it, or which are used or needed for railroad purposes, or or which are valuable for stone, iron, or coal.

30. Where it satisfactorily appears from the record in any contest that the lands in controversy come within the terms of this exemption, the Commissioner of the General Land Office in calling upon the individual claimant to exercise the privilege accorded to him (see paragraphs 17 and 18) will notify him that the railroad claimant can not be required to relinquish such lands, and that unless he elects to relinquish the same and take other lands in lieu thereof the contest will proceed to final determination without further regard to said act; and where such exemption is satisfactorily shown after the individual claimant has elected to hold the lands in contest (see paragraph 23), the Commissioner of the General Land Office will notify him thereof and accord him another opportunity, to be exercised within a stated time, to relinquish the lands in contest and take other lands. In the event that this privilege is declined, the contest will proceed to final decision in the usual way.

31. The affidavit of two persons having personal knowledge of the facts will be deemed sufficient to *prima facie* establish that any lands come within this exempted class; but such affidavit should state fully when and to whom the lands were sold or contracted to be sold, and if contracted to be sold the extent to which such contract has been performed, and whether it is still subsisting, the necessity for the present or future use of such lands for railroad purposes, and the extent thereof, or how it has been ascertained that they are valuable for stone, iron, or coal, as the case may be.

I.—PROCEDURE IN SELECTING LIEU LANDS AND PERFECTING TITLES THERETO.

32. Applications to select lieu lands hereunder, whether by an individual claimant or by the railroad claimant, must be presented to the local land office of the district within which the lands selected are situate. The application must particularly state the description and

acreage of the lands relinquished, the acceptance by the Commissioner of the General Land Office of the relinquishment, and the description of the lands selected (see paragraph 13), and must be accompanied by proof that the land selected is of the character subject to selection (see paragraphs 11 to 14, inclusive). If the records of the local office do not show to the contrary, the character of the land will be deemed to be *prima facie* established where the application is supported by the oath of the individual claimant, or of an agent of the railroad claimant, based upon a personal examination of the land.

33. If the application is in proper form and, upon examination of the records in the local office, the lands selected appear to be subject to such selection, the local officers will accept the application, give it an appropriate number, make due notation of the selection upon the records of their office, and transmit the papers to the Commissioner of the General Land Office for his consideration.

34. When the lands selected have been returned as mineral by the surveyor-general, the first subdivision of paragraph 103 of the mining regulations, approved December 15, 1897, shall be applicable thereto; but in view of the proof exacted by paragraph 32 hereof the requirements of paragraph 104 of such mining regulations will be dispensed with as to all selections hereunder of lands not returned as mineral.

35. When any lands, whether surveyed or unsurveyed, have been selected hereunder by an individual claimant or by the railroad claimant, no right thereto can be initiated by settlement or entry while such selection remains of record.

36. Where lands are selected by an individual claimant in lieu of lands the claim to which has not been carried to final entry and certificate, or to the submission of final proof entitling him to final entry and certificate, the claimant will be required to perfect his right to the lands selected by compliance with the law relating to that class of claims, and to submit proof thereof in the usual way, but credit will be given for his *bona fide* residence, improvements, cultivation, or reclamation, as the case may be, and for any payment of fees or purchase money upon the land relinquished, it being the purpose of the act to give individual claimants the same status with respect to the lieu lands selected by them which they occupied with respect to the lands relinquished.

J.—TIME OF ISSUING PATENTS TO SELECTED LANDS.

37. Unsurveyed lands, whether selected by an individual claimant or by the railroad claimant, will in no event be patented until after survey.

38. Unsurveyed lands selected by the railroad claimant will not be patented until after the expiration of four months from the date of the receipt at the local land office of the approved plat of the township embracing the lands so selected; and surveyed lands selected by the

railroad claimant will not be patented until after the expiration of four months from the date of selection.

39. Unsurveyed lands selected by an individual claimant in lieu of lands the claim to which has been regularly carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, will not be patented until after the expiration of four months from the date of the receipt at the local land office of the approved plat of the township embracing the lands so selected; and surveyed lands selected by an individual claimant in lieu of lands the claim to which has reached a like status will not be patented until after the expiration of four months from the date of selection.

40. The purpose of the last two paragraphs is, in all instances where publication and notice will not be had, to give to settlers, if any, upon such lands at the time of the selection thereof, the full period prescribed by law within which to apply at the local land office to make homestead entry of the land, and to afford ample time for the local officers to advise the Commissioner of the General Land Office of any such application before the time arrives for issuing patent under the selection.

41. Selections made by the railroad claimant which are found satisfactory by the Commissioner of the General Land Office will, upon the expiration of the time required to elapse before the issuing of patent (see paragraphs 37 to 40, inclusive), be certified to the Secretary of the Interior, and if approved by him will be patented to the railroad claimant as though originally granted.

K.—FORMS TO BE USED IN THE ADMINISTRATION OF SAID ACT.

42. The election of the individual claimant to hold or relinquish the lands in controversy and the proof of the maintenance of his claim may be made according to the following form:

THE STATE OF ———,
County of ———, *ss:*

———— ————, being first duly sworn, upon his oath deposes and testifies as follows:

1. Q. What is your name, age, and post-office address?—A. ———.

2. Q. Are you a native-born citizen of the United States; and if so, in what State or Territory were you born?—A. ———.

3. Q. If you are not a native-born citizen of the United States, have you declared your intention to become a citizen or have you been naturalized? If so, when and where?—A. ———.

4. Q. Are you the identical person who has heretofore been claiming (here describe land) under the —— law? If so, how and when was your claim initiated?—A. ———.

5. Q. Do you understand that there are conflicting claims to this land, one of which is your claim and the other of which is the claim of the Northern Pacific Railroad Company or its successor in interest?—A. ———.

6. Q. Do you desire and elect, under the act of Congress approved July 1, 1898 (30 Stat., 597, 620), to hold the land in controversy and

retain your present claim thereto, or do you desire and elect under said act to relinquish the land in controversy and to transfer your said claim to other lands?—A. ———.

7. Q. State fully and accurately where you resided from time to time since the initiation of your said claim to said land.—A. ———.

8. Q. Of whom does your family, if any, consist, and where have they resided from time to time since the initiation of said claim?—A. ———.

9. Q. State accurately what you have done in the way of improving, cultivating, or reclaiming this land, giving dates, value of improvements, and amount of expenditure.—A. ———.

10. Q. How much of the time were you upon said land during the year 1897, and what work did you do or have done thereon during that year?—A. ———.

11. Q. What personal property did you have on this land on January 1, 1898?—A. ———.

12. Q. Have you sold, conveyed, or mortgaged any portion of this land or assigned your claim thereto? If so, state when, to whom, and for what purpose.—A. ———.

13. Q. How much other land do you own now?—A. ———.

14. Q. Have you ever made a filing upon or an entry of other public lands? If so, give the time, description of the land, name of the land office, and character of the filing or entry.—A. ———.

15. Q. To whom can you refer for support and corroboration of the statements made herein?—A. ———.

(Sign plainly with full name.) ——— ———.

I hereby certify that the foregoing testimony was fully read to the said ——— ——— before being subscribed by him, and that the same was subscribed and sworn to by him before me this —— day of ———, ——.

——— ———.

NOTE.—This affidavit may be made before the register or receiver of the local land office, or before any other officer authorized to administer an oath.

If the claimant elects to relinquish the lands in controversy, he must execute the accompanying relinquishment.

43. A relinquishment by an individual claimant may be made substantially according to the following form, and one by the railroad claimant may be modeled therefrom:

Know all men by these presents:

That I, ——— ———, of ——— County, in the State of ———, the identical person who heretofore initiated and is now asserting a claim to the following-described lands, to wit, [describe fully and accurately] under the ——— law, desiring to take advantage of the provision in the act of Congress approved July 1, 1898 (30 Stat., 597, 620), authorizing an adjustment by the Land Department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, do hereby release, quitclaim, and relinquish unto the United States of America all my right, title, interest, and claim in and to the lands aforesaid, and I request that this relinquishment be accepted by the Commissioner of the General Land Office in order that, under the provisions of the act of Congress aforesaid, I may select other lands in lieu of those hereby relinquished, and may perfect and obtain title to the lands so selected instead of to the lands hereby relinquished.

I, ——— ———, wife of the said ——— ———, for the purposes aforesaid, do hereby join my said husband in releasing, quitclaiming,

and relinquishing unto the United States of America the lands aforesaid, and I do specially waive and relinquish any and all dower, homestead, or other interest in the lands relinquished to which I am now or might hereafter be entitled according to law.

Witness our hands and seals this —— day of ——, A. D. ——.

—— —— [SEAL.]

—— —— [SEAL.]

Witnessed by:

—— ——.

—— ——.

NOTE.—This relinquishment must be executed, witnessed, and acknowledged conformably to the laws respecting the conveyance of real property in the State where the lands relinquished are situate, and the officer before whom the acknowledgment is made must make and attach hereto, under his name and official seal, an appropriate certificate of such acknowledgment.

44. The application to select lands in lieu of those relinquished and the affidavit in support thereof may be substantially according to the following forms:

UNITED STATES LAND OFFICE AT ——,

(Date:) ——, ——.

No. ——.

I, —— ——, of the county of ——, in the State of ——, having made relinquishment of my (state character of claim) claim, covering the —— of section ——, in township ——, range ——, in —— land district, containing —— acres, heretofore included in the conflicting claims of the Northern Pacific Railroad Company, or its successor in interest, and myself, which relinquishment has been duly accepted by the Commissioner of the General Land Office, do hereby make application to select in lieu of the lands so relinquished the following lands, to wit: ——, in —— land district.

My post-office address is ——, ——.

—— ——.

UNITED STATES LAND OFFICE AT ——,

(Date:) ——, ——.

We hereby certify that we have carefully considered the foregoing application, and have critically examined the plats and records of this office, so far as they apply to the lands sought to be selected. Finding that the application and proofs fully conform to the statute and regulations thereunder, and that the lands selected appear by the records of this office to be subject to such selection, we have accepted the application and have made due notation thereof upon the records pending the advice of the Commissioner of the General Land Office. $ —— fees paid.

—— ——,

Register.

—— ——,

Receiver.

AFFIDAVIT TO BE MADE BY INDIVIDUAL CLAIMANT IN SUPPORT OF FOREGOING APPLICATION TO SELECT.

UNITED STATES LAND OFFICE AT ———,
(Date:) ———, ——.

No. ——.

I, ——— ———, of ——— County in the State of ———, being duly sworn upon my oath, do depose and say that my post-office address is ———, ———; that I am the individual claimant who makes the foregoing application under the act of July 1, 1898 (30 Stat., 597, 620); that I am acquainted with the lands sought to be selected under the foregoing application, and have examined every subdivision thereof; that there is not to my knowledge within the limits of said land any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or other mineral substance; that there is not within the limits of said land to my knowledge any placer or other valuable mineral deposit or any salines; that no portion of said land is claimed for mining purposes under local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year; that said land is essentially non-mineral land; that it does not to my knowledge contain any valuable stone, iron, or coal; that it is not reserved in any manner, is not subject to any valid claim whatsoever, and is not occupied by any settler. And further affiant sayeth not.

———, ———.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified to me); that I verily believe him to be a creditable person and the person he represents himself to be; and that this affidavit was subscribed and sworn to by him before me at my office at ———, within the ——— land district, on this —— day of ———.

———— ————,
———— ————.

NOTE.—This affidavit may be made before the register or receiver of the local land office or before any other officer authorized to administer an oath.

If the claim relinquished be a desert-land claim, timber-culture claim, or a timber-purchase claim, which has not been carried to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, the applicant must also make proof of the character of the land selected, as required by the regulations controlling that class of claims.

45. The following form may be used in listing lands to be relinquished by the railroad claimant:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., ———, *18*—.

Whereas, an act of Congress, approved July 1, 1898 (30 Stat., 597, 620), makes provision for the relinquishment by the Northern Pacific Railroad Company, or its successor in interest, upon the conditions therein named, of the whole or any part of an odd-numbered section, in either the primary or indemnity limits of the land grant to that company, to which the right of said company, or its lawful successor, is claimed to have attached by definite location, or selection, and which prior to January 1, 1898, has been "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler, under color of title or claim of right under any law of the United

States, or any ruling of the Interior Department," or which, if an odd-numbered section in the primary limits, is settled upon after January 1, 1898, and before survey, by a qualified person, in good faith, with a view to homestead entry, and makes provision for the selection by said company, or its successor in interest, of other lands in lieu of those relinquished; and

Whereas, it is further provided in said act that the Secretary of the Interior shall ascertain and from time to time cause to be prepared and delivered to said railroad company, or its successor in interest, a list or lists of the tracts coming within the provisions thereof; and

Whereas, it is further provided by said act that said railroad company, or its successor in interest, shall accept the list or lists so made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but "shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal;" and

Whereas, it is further provided as to all claims, excepting homestead settlements made on unsurveyed lands after January 1, 1898, that "before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee, or its successor in interest, any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them, or hold his claim and allow the said railroad company to do so under the terms of this act;" and

Whereas, upon examination by this office the following tracts of land have been found to be of the character authorized to be relinquished under said act, and the claimants therefor against the railroad company (where entitled to such option) have, upon due notice of their rights under said act, refused to transfer their respective claims to other lands, to wit:

List No. —.

STATE OF——, —— LAND DISTRICT.

Parts of sections.	Sec.	Tp.	R.	Adverse claimants.

Now, therefore, the said list is hereby submitted to the Secretary of the Interior for his consideration, with the recommendation that directions be given to this office to call upon the Northern Pacific Railroad Company or its successor in interest, as the case may be, to relinquish all of said lands or to satisfactorily show that those not relinquished have been sold or contracted to be sold, or are used or needed for railroad purposes, or are valuable for stone, iron, or coal; and to advise said railroad company or its successor in interest that upon filing the relinquishment requested it will be entitled to select other lands in lieu thereof, as provided in said act.

_____ _____,
Commissioner.

DEPARTMENT OF THE INTERIOR,
_____ —, *18*—.

Approved:

_____ _____,
Secretary of the Interior.

L.—CASES NOT COVERED BY THESE REGULATIONS.

46. If in the administration of said act cases are found which are not covered by these regulations, such cases will be disposed of according to their respective merits under special instructions, or supplemental regulations embracing cases of that character will be adopted, as may seem necessary.

BINGER HERMAN, *Commissioner.*

Approved February 14, 1899.
C. N. BLISS,
Secretary.